Filed 12/8/14 Dale v. Windsor Police Dept. CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

RUDOLPH DALE et al., Plaintiffs and Appellants, v. WINDSOR POLICE DEPARTMENT, Defendant and Respondent.	A138592 (Sonoma County Super. Ct. No. SCV252619)
OFFICE OF SONOMA COUNTY SHERIFF, Plaintiff and Respondent, v. DOCUMENTS SEIZED PER WARRANT NO. 12-565, Defendant; RANDOLPH DALE, Defendant and Appellant	A139271 (Sonoma County Super. Ct. No. SCV253459)
THE PEOPLE Petitioner, v. THE SUPERIOR COURT OF SONOMA COUNTY, Respondent; RANDOLPH DALE et al., Real Parties in Interest.	A139683 (Sonoma County Super. Ct. No. SCV253537)

These consolidated appeals and original writ proceeding arise out of the October 2012 execution of a search warrant at the residence of Randolph and Joan Dale, which

was also the locale of their business, Sonoma County Compassionate Collective (collectively, the Dales). Officers seized numerous items, including marijuana, marijuana recommendations, several firearms, ammunition, cell phones, computers, $6,282 in cash and over 4,000 pages of documents. While the Dales have never challenged the validity of the warrant or scope of the search, within weeks of the seizure they commenced efforts to obtain the return of the property. These efforts precipitated (1) an order (by Judge Owen) denying a writ petition filed by the Dales against the Sonoma Superior Court Clerk (clerk), the Windsor Police Department (police department), and the Sonoma County Sheriff's Office (Sheriff), from which the Dales have appealed (case No. A138592), (2) an order (by Judge Wick) largely granting the Sheriff's motion for relief from a Penal Code section 1536.5 demand by the Dales for copies of the seized documents, from which the Dales have also appealed (case No. A139271), and (3) a partially conflicting order (by Judge Daum) providing the Dales with copies of all seized documents and directing the return of the seized cash, which the Sheriff and Sonoma County District Attorney (district attorney) have challenged by way of an original writ proceeding in this court (case No. A139683).

A year after the search and seizure, and after the appeals and original writ proceeding were filed, the district attorney filed forfeiture proceedings against both the Dales and criminal charges against Randolph Dale. We therefore requested supplemental briefing on whether the appellate matters are now moot. As we explain, we conclude these subsequent events render the two appeals moot and also render the original writ proceeding moot to the extent it challenges providing copies of all seized documents to the Dales, since the Dales have now received such copies through discovery in the criminal cases against Randolph. As to the remainder of the original writ proceeding, which concerns the cash ordered returned to the Dales, we grant relief and direct issuance of a writ requiring the trial court to vacate its order and enter an order dismissing the proceeding as moot.

BACKGROUND

We recite only the facts relevant to the issues in these consolidated appeals and writ proceeding. On October 4, 2012, the Sheriff executed a search warrant for property the Dales (who are brother and sister) occupied in Windsor, California. Officers seized numerous items, including processed marijuana, scales, marijuana packaging, a money counter, firearms, ammunition, cell phones, $6,282 in cash, and over 4,000 documents, including medical marijuana recommendations.

Several weeks later, the Dales attempted to file a "motion for return of property" in the criminal department of the Sonoma County Superior Court. They claimed they had not received a copy of the affidavit supporting the search warrant and no return was filed within 10 days of execution. They demanded a prompt, postseizure "probable cause" determination and return of all property or, at the very least, all property that could be copied. The court clerk refused to file the motion because no criminal proceedings had been commenced and advised they should file a civil proceeding for return of property.

Instead, the Dales filed a petition for writ of mandate against the court clerk, police department and Sheriff. As to the court clerk, they sought a writ commanding the clerk to "establish a procedure which allows for the filing of a motion for return of property, and the prompt setting of a hearing thereon" in the criminal department, and to file and set their motion. As to the police department and Sheriff, they sought a writ requiring respondents "to provide notice within 2 days of seizure and a prompt post-seizure judicial hearing within 10-days of seizure, whereby the Court may determine the legality of the initial seizure of property and the government's right to retain the property" and requiring them to return the property. Such a validity determination would apparently include consideration of their claimed right to possession under the Compassionate Use Act (CUA) (Health & Saf. Code, § 11362.5) and Medical Marijuana Program Act (MMPA) (*id.*, § 11362.7 et seq.).

The same day the Dales, on behalf of the collective, also served the Sheriff with a Penal Code section 1536.5 demand for copies of all documents seized.[1] The Sheriff did not respond within the statutory 10-day period (Pen. Code, § 1536.5, subd. (b)(1)) and later claimed the demand was lost.

In December, the parties agreed to defer the Penal Code section 1536.5 issue until early January 2013, and to a hearing on the writ petition in February. In mid-December, the Dales served a second section 1536.5 demand on the Sheriff. The office again did not respond within 10 days, but in late January, provided the Dales with copies of 401 of the 4,000-plus pages seized.

Also in late January, the court clerk filed an answer and opposition to the writ petition asserting there were no criminal cases in which to file the Dales' "motion for return of seized property" and their remedy was a civil proceeding for return of property. The Sheriff filed an answer and opposition, as well, asserting the affidavit and warrant had been filed with the court on October 31, 2012 (27 days after execution), and the office had no ministerial duty to provide notice beyond the property inventory sheet and no duty to proved a postseizure judicial hearing. The Sheriff further asserted no copies of additional pages of documents should be provided pursuant to Penal Code section 1536.5 in light of the ongoing investigation into the Dales' marijuana activities.

On March 19, 2013, the trial court (Judge Owen) heard the Dales' writ petition and Penal Code section 1536.5 demand and on March 26 issued a written order. The court denied the petition on the ground "[n]o authority [had] been presented to support a finding that a motion for return of property filed and decided in the Civil Division rather than the Criminal Division would prejudice petitioners." As to the Dales' section 1536.5 demand, the court ordered the Sheriff to comply within 10 days or file a motion seeking

[1] This statute allows a "business entity" to serve a demand for copies of seized business records on the agency executing the search warrant. (Pen. Code, § 1536.5, subd. (a).) The agency has 10 days to either produce copies, file a motion to determine if copies should be produced, or file a motion for more time to decide how to respond. (*Id.*, § 1536.5, subds. (b) & (d).)

relief from the demand. The Dales appealed the denial of their writ petition (case No. A138592).

The Sheriff then filed a civil proceeding seeking relief from the Penal Code section 1536.5 demand on the ground providing copies of additional seized documents would interfere with an ongoing criminal investigation. The Sheriff proffered the seized documents for *in camera* review by the court. The Dales asserted the Sheriff's request for relief was untimely and there would be no interference with an investigation because they already knew what was in the documents.

On June 7, 2013, the trial court (Judge Wick) commenced an *in camera* review of the seized documents. Ten days later, on June 17, the court issued a written order directing the Sheriff to provide copies of approximately a 1,000 pages, but finding the remainder were properly withheld on the statutory ground producing copies would "pose a significant risk of ongoing criminal activity," or the records were "contraband" or "evidence of criminal conduct by the entity from which the records were seized." (§ 1536.5, subd. (c)(2).) The Dales also appealed this order (case No. A139271).

In the meantime, on April 16, 2013, the Dales had finally filed a civil proceeding against the Sonoma District Attorney and Sheriff for return of the seized property. They continued to assert they had a constitutional right to a "prompt post-seizure judicial hearing" in which the government had to establish the legality of the initial seizure and right to retain the property "in light of available defenses to the government's accusations," namely their defenses under the CUA and MMPA. Ultimately, however, they urged the court to accommodate both the People's investigatory and prosecutorial interests and their own interests and asserted need for the property (particularly the documents and cash) by ordering the return of all property that could be copied, on stipulation they would not object to use of the copies in any subsequent criminal or forfeiture proceedings.

The district attorney and Sheriff opposed the motion for return of property on the ground such a motion brought before criminal charges are filed is limited to two issues—whether a sufficient showing of probable cause was made at the time the search warrant

was issued, and whether the search exceeded the scope of the warrant—and the Dales made neither claim. The district attorney further argued the evidence the Dales submitted with their motion did not conclusively establish their claimed statutory defenses, and whether they had compassionate use defenses was a matter for a jury to decide.

The Dales' motion for return of the seized property was heard on June 19 by Judge Daum (two days after Judge Wick issued the order largely denying their section 1536.5 demand). Three weeks later, on July 8, Judge Daum issued an initial written order concluding the Dales were "in something of a Catch-22" in that they claimed to have a valid medical marijuana defense, but they could not assert it until criminal charges were filed. To "remedy" this perceived problem, the court, in a "final" order and stipulation filed a month later on August 9, ordered the Sheriff to make and provide the Dales with copies of all seized documents, and further ordered the cash returned to the Dales upon stipulation they were precluded from objecting to evidentiary use of copies of the cash in any criminal or forfeiture proceeding. This latter order also made clear that, except as to the cash and documents, the Dales' motion for return of property was denied "without waiver of the parties' respective rights to seek appropriate appellate relief."[2] The district attorney and Sheriff filed an original writ proceeding challenging this order. We issued a stay and an order to show cause.

In October 2013, a year after the search and seizure, the district attorney filed forfeiture actions against both Dales.[3] In November and December, the district attorney

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[2] At oral argument, counsel for the Dales claimed the orders also provided (a) the Dales would be required to return the cash if the district attorney instituted forfeiture proceedings and (b) their motion for return of property was denied as to the remainder of the seized property "without prejudice" to their renewing the motion at a later time. The orders neither singularly, nor collectively, so provide. There is no provision requiring the Dales to return the cash, and there is no provision denying their motion as to property, other than the cash and documents, without prejudice.

[3] We grant the district attorney's and Sheriff's request for judicial notice of these forfeiture proceedings and the criminal actions against Randolph Dale. (Evid. Code, §§ 452, subds. (c) & (d), 459.)

filed criminal charges against Randolph Dale and others, for cultivating marijuana for purposes of sale (Health & Saf. Code, §§ 11358 & 11360, subd. (a)), planting, cultivating, harvesting or processing marijuana (*id.*, § 11358), and possessing marijuana for purposes of sale (*id.*, § 11359). In January 2014, in criminal case No. SCR-640791, Dale gave notice of his intent to present a medical marijuana defense at the preliminary hearing.

DISCUSSION

A. *The Dales' Appeal from the Denial of Their Writ Petition Is Moot*

As we have recited, less than a month after execution of the search warrant, the Dales filed a petition for a writ of mandate against the court clerk, the police department and Sheriff. They complained the court clerk refused to file their motion for return of property in the criminal department and advised they needed to file a civil proceeding for return of the property, which would entail their paying a $435 filing fee. They complained the police department and Sheriff refused to return the seized property despite the absence of criminal or forfeiture proceedings "or any other justification which would provide grounds for the continued retention of the property."

More sweepingly, the Dales purported to "challenge the non-existent post-seizure notice and hearing process as a whole" as an unreasonable continued seizure under the California Constitution,[4] "including the [court clerk's] failure and refusal to accept for filing without fee, assign a case number of some sort, and timely calendar for hearing in the criminal department" the Dales' motion for return of property; the police

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We also grant the Dales' motion for judicial notice of the docket, certain pleadings and orders in the trial court, the Sonoma County Superior Court Local Rules, rules 4.2, 5.1 and 5.6, and the Sonoma County Superior Court Civil Calendar, attached as Exhibits 1-6 to their motion. (Evid. Code, §§ 452, subds. (c), (d), 459.) We deny the Dales' motion for judicial notice of the appellate proceedings and opinion in case No. A139057 due to lack of relevance. "[M]atters subject to judicial notice must be relevant to issues raised on appeal." (*Sheet Metal Workers' International Association, Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 199, fn. 3.)

[4] In a footnote in their petition, they asserted the lack of a postseizure hearing also violated federal constitutional rights, except as to the "medical marijuana."

department's and Sheriff's failure "to afford prompt post-seizure notice and an administrative or judicial hearing to determine the legality of the continued seizure of Dale's property; and the [police department's] and [Sheriff's] failure and refusal to return the Dales and the Collective's property." They maintained "due process guarantees and search and seizure provisions of the California Constitution require that the property owner be given notice of the property seized and the right to a prompt post-seizure hearing which generally must occur within 10-days of the initial seizure."

The Dales further asserted that, at this hearing, the government had to establish the legality of the initial seizure, as well as the continued seizure, in light of their defenses under the CUA and MMP. In addition, the court had to consider alternatives to continued seizure, such as ordering that copies be made or property returned on posting a bond. They claimed a civil proceeding to recover their property was not a sufficient option because they would need to retain counsel and incur filing fees, and civil proceedings could drag on for months, if not years.

As to the court clerk, the Dales sought a writ requiring the clerk "to establish a procedure which allows for the filing of a motion for return of property, and the prompt hearing thereon, where there are no criminal charges pending and no forfeiture action has been filed." (5) As to the police department and Sheriff, they sought a writ requiring them "to provide notice within 2 days of seizure and a prompt post-seizure judicial hearing within 10-days of seizure, whereby the Court may determine the legality of the initial seizure of property and the government's right to retain the property."

As stated at the outset, we asked for supplemental briefing on whether the appellate matters before us have been rendered moot in light of the filing of forfeiture proceedings against both of the Dales and criminal charges against Randolph Dale. The Dales, the police department and Sheriff share the view these events have not rendered moot the Dales' appeal from the denial of their writ petition. The Attorney General, representing the court clerk, takes a contrary view as to the clerk, since there are now forfeiture and criminal proceedings in which the Dales can file the sort of motion the clerk previously rejected.

In our view, the filing of the forfeiture and criminal proceedings entirely moots the Dales' appeal from the denial of their writ petition. What they sought to compel by writ was a prompt, postseizure hearing *prior to the filing* of forfeiture actions or criminal charges. The window for any such relief irrevocably closed once forfeiture proceedings and criminal charges were filed. Thus, no effective relief can be granted on appeal in connection with their claimed entitlement to a prompt, postseizure hearing at which the government would have to establish probable cause, apparently in the face of evidence allegedly supporting their defenses under the CUA and MMPA. Their appeal is therefore moot.[5] (*Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 175.) We decline the Dales' invitation to nevertheless decide the merits of their appeal given the relatively unique facts of this case.

B. *The Dales' Appeal from the Order Granting the Sheriff's Request for Relief from the Penal Code Section 1536.5 Demand Is Moot*

The Dales, the District Attorney and Sherriff all agree the filing of the forfeiture and criminal proceedings has rendered moot the Dales' appeal from the trial court's order largely granting the Sheriff's request for relief from the Penal Code section 1536.5 demand. This is because, pursuant to discovery in the criminal cases, the Dales have now received copies of all of the documents seized during the search.

We agree the Dales' appeal is moot and again decline the parties' invitation to nevertheless decide the merits, given the unique procedural history of the Penal Code section 1536.5 demands and factually intensive nature of the trial court's inquiry in ruling on the Sheriff's motion for relief.

[5] That they asked for return of the property as part of the writ relief they sought, does not alter the fact the filing of the forfeiture proceedings and criminal charges have rendered their appeal moot. The return of the property can only be viewed as the outcome they desired and anticipated would follow the prompt judicial hearing to which they claimed entitlement and which subsequent events have made moot.

C. ***The Original Writ Proceeding from the Order Directing the Return of Property is Moot as to Copies of the Seized Documents and has Merit as to the Seized Cash***

The Dales contend the filing of the forfeiture and criminal proceedings, and discovery therein, has not rendered moot the Sheriff's and district attorney's original writ proceeding challenging the return order. While the Sherriff and the district attorney state only the appeal from the section 1536.5 order is moot, they make no argument in their supplemental letter brief as to the seized documents in connection with their discussion of whether their original writ proceeding is moot. Thus, it appears, to the extent their original writ proceeding challenged the trial court's order requiring that copies of the documents be provided, they implicitly concede that aspect of the trial court's order is now moot, since the Dales have received copies of the documents in the course of discovery in the criminal cases. Rather, in their supplemental letter brief, the Sheriff and district attorney focus on the directive to return the seized cash.

We conclude the subsequent proceedings have mooted the Sheriff's and district attorney's original writ proceeding to the extent it challenges the trial court's directive to provide copies of all the seized documents. We note that unlike the court's initial order which indicated the documents, themselves, were to be returned (with the district attorney retaining copies), the final order expressly directed the Sheriff to provide copies of the documents, not the originals. Since the Dales have now been provided such copies in connection with discovery during the criminal proceedings, the original writ proceeding is moot to the extent it challenges this aspect of the trial court's order for the same reason the Dales' appeal from the order on their Penal Code section 1536.5 demand is moot.

That leaves at issue only the seized cash. As we indicated at the outset, in its final order and stipulation, the trial court observed its initial order had not mentioned any of the other property seized, save for the documents. Thus, the final order made clear the

Dales' request for return of any of the other seized property, except for copies of the documents and the cash, was denied without prejudice to seeking appellate review.[6]

"When property is seized pursuant to warrant, the property must be retained in the custody of the officer, subject to order of the court in which the warrant is returnable or the offense relating to the property is triable. (Pen. Code, § 1536.) An officer who seizes property under a search warrant does so on behalf of the court for use in a judicial proceeding. (*People v. Icenogle* (1985) 164 Cal.App.3d 620, 623 . . . .) [¶] . . . [¶] The trial court is empowered to entertain a motion for return of seized items by section 1536, as well as by the court's inherent power to control and prevent the abuse of its process. (*People v. Superior Court* (1972) 28 Cal.App.3d 600, 607 . . . ; *People v. Icenogle, supra*, 164 Cal.App.3d at p. 623.)" (*Ensoniq Corp. v. Superior Court* (1998) 65 Cal.App.4th 1537, 1547, fn. omitted (*Ensoniq*).) "If no criminal action is pending, an owner's motion for return of seized property is classified as a special proceeding. (*Avelar v. Superior Court* (1992) 7 Cal.App.4th 1270, 1276 . . . [motion under §§ 1539–1540 is a special proceeding].)" (*Ensoniq, supra,* 65 Cal.App.4th at p. 1547.)

Accordingly, "[b]oth criminal defendants and nondefendants may move for return of seized property because the search warrant or seizure was unlawful. A defendant may move for return of property or suppression of evidence pursuant to sections 1538.5 and 1540, on grounds that the search or seizure was illegal, or the warrant was insufficient on its face. (*Buker v. Superior Court* (1972) 25 Cal.App.3d 1085, 1088 . . . .)" (*Ensoniq, supra,* 65 Cal.App.4th at p. 1547.) A "nondefendant may move for return of property" under Penal Code sections 1539–1540 "on grounds that the property taken was not the same as that described in the warrant, or that there was no probable cause to believe the existence of the grounds on which the warrant was issued. (*People v. Superior Court* (*Chico etc. Health Center*) (1986) 187 Cal.App.3d 648, 650 . . . .)" (*Ensoniq, supra,* 65 Cal.App.4th at p. 1547; see also *Chico etc. Health Center, supra,* 187 Cal.App.3d at p. 652 [where owner of seized business records had not been charged with criminal

[6] Only the district attorney and Sheriff sought appellate review by way of the original writ proceeding.

offenses a year after execution of the warrant and filed a motion for return of property, court and parties "treated the proceedings before the magistrate as a motion for the return of property pursuant to Penal Code section 1540," which was "an accurate characterization of the proceeding"].)[7]

There can be no question, then, the trial court had jurisdiction to entertain the Dales' civil proceeding and motion for return of the property before any forfeiture or criminal proceedings were filed. Indeed, the Sheriff and district attorney did not dispute the Dales could pursue such a proceeding. They maintained, however, its scope was limited to determining whether sufficient probable cause had been shown at the time the warrant was issued and whether the scope of the search had exceeded that authorized by the warrant. Since the Dales, in their motion, expressly acknowledged "their property was seized with probable cause based on existing appellate case law" and made no attack of the scope of the search, the Sheriff and district attorney maintained the motion for return of the property had to be denied.

For their part, the Dales did not ask for an evidentiary hearing in connection with their motion, asserting "if [they] are ever afforded access to the evidence against them . . . they will establish the legality of their conduct under the state's medical marijuana laws, which would compel the release of all their property." (Fn. omitted.) Rather, they appended to their motion a declaration of their attorney attaching copies of the search warrant and affidavit, and the return and list of the property seized (although objections were made to the affidavit on hearsay grounds). Their attorney asserted "[t]o my knowledge" the Dales were "qualified patients" and legally permitted to sell marijuana to other qualified members of the "collective." He further stated the seizure and retention of the property had "effectively shut down the operation of the Collective" and also

[7] Penal Code section 1540 provides: "If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken." (Pen. Code, § 1540.)

impaired the Dales' ability to prosecute their lawsuit against the County of Sonoma challenging the denial of a permit to open a medical marijuana dispensary.

Despite assertions they were legally entitled to possess and sell marijuana, the position the Dales ultimately took was that the trial court should order the release of the property because means other than continued retention existed to protect the Sheriff's and district attorney's interests (such as making copies of the documents and cash in conjunction with a binding evidentiary stipulation) and they were being harmed by the loss of use of the property. Indeed, at the hearing on their motion, the Dales' counsel recognized "the countervailing interests of the Prosecution and the district attorney of being able to investigate and prosecute crimes." He thus stated, "what I'm suggesting to the Court is that ultimately the determination that the Court would need to make is whether or not the specific items in question must be held in evidence or whether that there is an alternative means available to the Court, short of continued retention."[8] In support of this approach, the Dales repeatedly cited to *Buker v. Superior Court, supra*, 25 Cal.App.3d 1085 (*Buker*), and their attorney invoked the decision at the hearing, asserting the instant case could "ultimately be resolved by the Court, under the same parameters of *Buker*, which is to determine which items can be duplicated and order them released."

During the hearing, the trial court made no comment on the merits of the Dales' motion for return of property, took the matter under submission, and two weeks later issued its initial order. The court mused the case presented "something of a conundrum in the developing area of the Compassionate Use Act and the apparent conflict with the State Marijuana laws" and the Dales were "in something of a Catch-22 in light of the fact that although the seizure was pursuant to a warrant which they do not challenge, they are

[8] The Sheriff's and district attorney's insistence the Dales wanted the trial court to rule on their compassionate use defenses is therefore not entirely accurate. While the Dales repeatedly claimed they were entitled to a "probable cause" determination and suggested it could entail consideration of evidence of compassionate use defenses, at the end of the day they invited the trial court to make a balancing determination and a ruling that would accommodate both their own and prosecutorial interests.

being prevented from exercising their rights to appropriate due process avenues for return of the seized items." The court then stated its "intended ruling" was to return the cash and documentation. "The People are certainly capable of copying the documentation as well as the currency and, assuming an appropriate stipulation to use for purposes of any future criminal prosecution of [*sic*] forfeiture action by Defendants, will not be prejudiced thereby." In other words, the trial court accepted the Dales' suggestion to follow *Buker*, and its final order incorporated an evidentiary stipulation by the Dales and required copies of all documents be provided to them and the cash returned to them.

In *Buker*, the defendants, who had been charged with various marijuana offenses, filed a motion for return of some $6,400 seized during the execution of a search warrant, claiming they needed the funds to retain counsel. They asserted the money was not "contraband" and offered to stipulate to the amount seized and where it was found, and suggested the prosecution could make and use copies of the money. (*Buker*, *supra*, 25 Cal.App.3d at pp. 1087–1088.) The trial court denied the motion because "there was 'some color [*sic*] on which [the money] could be admitted' in as evidence." (*Id.* at p. 1088.) The Court of Appeal concluded the trial court had abused its discretion and issued a writ ordering the trial court to vacate its denial of the motion and to hold further proceedings on the defendants' actual ownership of/entitlement to the cash (in light of an apparent claim to the money by the IRS). (*Id.* at pp. 1089–1091.) The appellate court noted there "was no showing the currency was contraband or marked money" and the cash, itself, was not necessary to prove intent, particularly given the evidentiary stipulation proffered by the defendants. (*Id.* at pp. 1088–1089.)

What *Buker* said nothing about, however, were the drug forfeiture laws. These statutes now identify as property subject to forfeiture "[a]ll moneys . . . furnished or intended to be furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys . . . . intended to be used to facilitate any violation of Section . . . 11359, 11360 . . . ." (Health & Saf. Code, § 11470, subd. (f); see *People v. Ten $500 etc. Travelers' Checks* (1993) 16 Cal.App.4th 475, 478.) Such monies are expressly subject to seizure (Health & Saf. Code, § 11471,

subd. (a)), and prosecuting authorities have one year from seizure or from the filing of a lis pendens against the property, to file a forfeiture petition. (*Id.*, § 11488.4, subd. (a).) Thus, there is far more at issue in the instant case than whether the cash, itself, is "evidence" of intent that might be proffered in any future criminal case. In this case, the cash, *itself*, is the object of the forfeiture statutes.

Furthermore, the defendants in *Buker* sought return of the seized cash to retain counsel of their choice, a matter of great significance to the court. (*Buker*, *supra*, 25 Cal.App.3d at pp. 1087–1088.) Accordingly, in the defendants' subsequent appeal from their convictions, the same court reversed on the ground the trial court had abused its discretion by refusing to grant a continuance of the trial to allow completion of an interpleader action to determine whether the defendants or the IRS were entitled to the money. (The trial court had concluded it could not adjudicate ownership in connection with the pending motion for return of property and the proper vehicle was an interpleader action.) This, said the appellate court, had denied defendants the important right to be represented by counsel of their choice. (*People v. Vermouth* (1974) 42 Cal.App.3d 353, 358–360.)

More than a decade later, however, in considering revisions to the drug forfeiture laws, the Court of Appeal held "the California statutory scheme authorizes forfeiture of even that property necessary for the retention of private counsel" and "such retention is not prohibited by the constitutional right to counsel." (*People v. Superior Court* (*Clements*) (1988) 200 Cal.App.3d 491, 494, 497–501.) In *Clements*, four defendants charged with drug offenses filed motions for return of seized monies on the ground the funds were necessary to retain counsel of choice. (*Id.* at p. 494.) The municipal court granted the motions, and after the superior court denied a writ petition, the prosecution filed an original writ proceeding in Division Four of this court. (*Id.* at pp. 494–495.) The appellate court granted the petition and issued a writ requiring the superior court to vacate its order and issue an appropriate writ to the municipal court. (*Id.* at p. 501.)

In addressing the defendants' claim the retention of the seized monies implicated their constitutional rights, the *Clements* court pointed out counsel would be appointed if

the seizure rendered them unable to retain private counsel, while the government, in turn, had a strong interest in seizing drug-related monies. "[T]he deterrent purpose of stripping drug dealers of the advantage of securing private attorneys with illicit funds obviously cannot be accomplished if the defendants are allowed funds for private counsel throughout the criminal proceedings. The means, i.e., forfeiture, are necessary to the accomplishment of the purpose." (*Clements*, *supra*, 200 Cal.App.3d at p. 500; see also *United States v. Monsanto* (1989) 491 U.S. 600, 615–616 [rejecting claim freezing assets for forfeiture impaired constitutional right to counsel].) Thus, the right to counsel of choice, which to a large extent drove the outcome in *Buker*, does not hold sway where the drug forfeiture laws are in play, as they are here.

We therefore conclude the trial court erred (and thus abused its discretion) in focusing solely on the evidentiary value of the cash and disregarding the purpose and effect of the forfeiture statutes. The court wholly ignored that it is the cash, *itself*, that is subject to forfeiture and no evidentiary stipulation can protect the People's interest in ensuring that those monies are not dissipated or disposed of. Indeed, the Dales not only failed to make any showing or averment the cash would not be disposed of, but they affirmatively suggested they were going to use it to prosecute other legal proceedings related to their collective.

This brings us to the proper disposition of the original writ proceeding. Often when a trial court errs or abuses its discretion by employing an incorrect legal analysis, the appropriate disposition is reversal and remand for further proceedings utilizing the correct legal standard. However, the only ruling the court can make at this juncture is to deny the motion for return of property and dismiss the civil proceeding for return of property, since forfeiture and criminal proceedings have now been filed, rendering the civil proceeding moot. We therefore grant the Sheriff's and district attorney's writ petition to the extent it challenges the trial court's order requiring return of the seized cash and direct that a writ issue commanding the court to vacate its order granting the Dales' motion for return of the cash and enter a new order denying the motion and dismissing the civil proceeding as moot.

DISPOSITION

Case Nos. A138592 and A139271 are dismissed as moot. The original writ proceeding filed by the Sonoma County Sheriff's Office and the Office of the Sonoma District Attorney, case No. A139683, is (a) dismissed as moot to the extent it challenges the trial court's order directing that copies of all seized documents be provided to the Dales and (b) granted to the extent it challenges that part of the trial court's final August 9, 2013, order directing that the seized cash be returned to the Dales. A peremptory writ shall issue commanding the trial court to vacate that portion of its August 9, 2013, final order and to enter a new order denying the Dales' motion for return of the seized cash and dismissing the civil proceeding as moot. Costs on appeal and in connection with the original writ proceeding to respondents.

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Banke, J.

We concur:

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Margulies, Acting P. J.

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Dondero, J.